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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY Respondent, and LEADPOINT Respondent, and TEAMSTERS LOCAL 350, Petitioner	Case No. 32-RC-109684 **BFI'S RESPONSE BRIEF**

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INTRODUCTION

Despite the assertions of the Union and the protestations of its amici, this case does not present a basis for revising 30 years of settled law. First, BFI simply does not directly control the terms and conditions of employment of Leadpoint's employees such that it can be deemed an employer under the Board's applicable standards – it is not even a close call. Second, Congress and the Supreme Court have made abundantly clear that an employment relationship exists under the Act only when the putative employer directly controls the workers, regardless of the legal standard the Board wants to now promulgate.

Nonetheless, the Board has delayed Leadpoint's employees' Section 7 rights so that it may consider expanding the definition of "employer." The expanded definition proposed by the Union and General Counsel (GC) would find that untold numbers of businesses are joint employers – including franchisors, service providers, companies that operate under cost-plus contracts, and companies that have outsourced or subcontracted operations – simply because (1) they have control over another business that "implicates" the other company's employees' terms and conditions of employment, and (2) a regional director concludes that having them at the negotiating table would be essential for "meaningful bargaining." Yet, nothing in the record or the Union's amici briefs demonstrates that there is a basis to justify revisiting the Act's long-standing definition of "employer." The only thing that has changed is the composition of the Board.

The vicissitudes of politics may justify a change in Board policy, but they cannot justify a wholesale re-write of a statutory term in a manner that is contrary to the Act's language and legislative history. That is particularly true where, as here, the proposed re-write would frustrate rather than foster the process of collective bargaining. The Board should not abandon its 30-year -old joint employer standard in favor of the fatally-flawed test the Union and GC have proposed.

ARGUMENT

I. The Record Does Not Support The Union's Claim That BFI Is A Joint Employer Of Leadpoint's Employees Under Current Board Law.

The Union's arguments challenging the ARD's factual conclusions are largely based on exaggerating, mischaracterizing and/or ignoring the evidence, most of which were addressed in BFI's opening brief to the Board. As discussed in BFI's opening brief, the Board's own regulations require the DDE be affirmed unless either the factual determinations are clearly erroneous *and* prejudicial to the Union or the legal conclusions departed from Board precedent. 29 C.F.R. § 102.67(c). The Union has failed to meet those standards.

A. The Union's Claim That BFI Controls Hiring Qualifications For The Leadpoint Workers Mischaracterizes And Ignores The Evidence.

The Union asserts that BFI controls hiring qualifications for the Leadpoint employees by *reserving the right* to determine hiring qualifications and reject Leadpoint workers.[1] However, as established in BFI's opening brief, while BFI reserves the right to set basic hiring qualifications, in actuality, Leadpoint independently set hiring qualifications (such as the detailed "top rating" productivity standards and physical tests), makes all hiring decisions and provides its employees with the necessary training, uniforms and personal protective equipment (PPE).[2] (BFI Br. at 14-16, 23, 33-36, 40.) BFI's inchoate contractual right is inadequate to establish joint employer status under current Board law. *Laerco Transp. & Warehouse*, 269 NLRB 324 (1984) (setting basic qualification requirements and rejecting one worker insufficient); *AM Prop. Holding Corp.*, 350 NLRB 998, 1000 (2007) ("[T]he Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.").

[1] Ironically, the Union argues that BFI is a joint employer because it reserves the right to control hiring qualifications while criticizing the ARD's focus on Leadpoint's exclusive control over the actual hiring process by arguing that hiring decisions are not mandatory subjects of bargaining.

[2] Contrary to the Union's argument, the Agreement does not limit the Leadpoint workers' PPE to only that provided in the Agreement; rather, it simply requires that Leadpoint, as the employer, purchase all PPE for the Leadpoint workers. (Jt. Ex. 1, at ¶ 5.)

B. The Union's Claim That Leadpoint Cannot Change The Number Of Sorters On The Lines Mischaracterizes The Evidence And Ignores The Law.

Although the Union asserts that Leadpoint cannot change the number of Sorters on the sorting lines, as explained in BFI's opening brief, Leadpoint determines if it needs to call in additional Sorters and does not always meet BFI's target headcounts.[3] (BFI Br. at 37.) At any rate, as the DDE recognized, user companies often set the requisite *number* of workers needed to perform services to control costs without becoming a joint employer; what distinguishes a customer from an employer is the ability to *select the individual* who will be hired or assigned to fill the customer's needs. *See, e.g., Chauffeurs, Teamsters & Helpers Local Union No. 776*, 313 NLRB 1148, 1163 (1994) ("[D]esignating how many and what kind of drivers [the user company] needs from [the supplier company] on a day-to-day basis is a determination which only it can make .... [and] does not constitute sufficient control to support a joint-employer finding."); *S. Cal. Gas Co.*, 302 NLRB 456, 461 (1991) (contracting for a specific number of day-shift workers insufficient).

C. The Union's Claim That BFI Controls The Hours Worked Each Day By The Leadpoint Workers Ignores And Misinterprets The Evidence.

Understandably, BFI sets the general shifts and holidays for its facility and determines how long it will operate (i.e., when the sorting lines will run). The Union's contention, however, that BFI schedules the Leadpoint workers such that Leadpoint cannot bargain with the Union over hours, breaks and holidays without BFI misinterprets and ignores the relevant evidence. As the ARD properly found, Leadpoint, not BFI, is responsible for deciding:

- who works which shift
- which sorting line each Sorter will work on
- which requests for leave will be approved
- which Sorters stay for overtime if the lines run longer than normal
- whether to call in additional workers and whom to call. (DDE at 17-19.)

[3] The Union makes no similar argument in regards to the Screen Cleaners or Housekeepers.

Moreover, the Union's claim about holidays is a red herring. Leadpoint can establish whatever holidays it wants: many employees work holidays, but such "holidays" are nonetheless recognized by their employers giving the employees premium pay. There is nothing that prevents the Union from negotiating the same arrangement with Leadpoint. Indeed, the Union could bargain exclusively with Leadpoint over who works which shifts and on what lines, whether to provide them holiday pay on days the Recyclery stays open, how many paid days off they receive and how many hours they can be required to work in a day or week. [4]

Contrary to the Union's claim that the ARD failed to consider Leadpoint's supposed inability to determine breaks (because BFI determines when the line operates), the ARD correctly recognized that simply because the line is not operating does not determine that there will be a break. Rather, Leadpoint determines whether its Sorters should work performing different tasks or take a break when the line is stopped. (BFI Br. at 29.) Furthermore, there is no evidence suggesting Leadpoint lacks authority to grant a break to a particular Sorter while the line is running (e.g., by substituting in another Leadpoint employee); to the contrary, it is the Leadpoint supervisors who call the Sorters back from their breaks. (BFI Br. at 29, 37, 45-46.) Similarly, Leadpoint alone controls the workers' stretching time as the lines start at the same time every day. (BFI Br. at 23, 37.) The Union could negotiate earlier start times with Leadpoint to allow employees a longer time to stretch without involving BFI.

Accordingly, there is no evidence demonstrating that bargaining over schedules would be meaningless without BFI. Like every business, Leadpoint operates under economic constraints imposed by its customer, BFI, and thus may be less willing to agree to some Union demands in bargaining than others. However, other than the basic fact that BFI has contracted with Leadpoint

[4] As explained it is opening brief, BFI notifies Leadpoint supervisors if lines are going to run past scheduled shift end times; Leadpoint alone decides who stays for overtime, which they communicate to the Leadpoint workers. (BFI Br. at 22.) Thus, Leadpoint would be free to bargain with the Union regarding overtime without needing to involve BFI.

to perform services on site – which does nothing to establish direct control over Leadpoint's employees – BFI does not control their shifts, work days, holidays or breaks.[5]

D. The Union's Claim That BFI Is The "Ultimate Source" Of Wage Increases For The Leadpoint Workers Ignores And Mischaracterizes The Evidence.

The Union's claim that BFI controls all wage increases is patently not true. The Union's own witness, Harlin, specifically refuted that claim by admitting Leadpoint gave him a raise. (Tr. 231-33.) As BFI has established, it has no control over any wage increases provided to Leadpoint employees. (BFI Br. at 30-33.) Rather, Leadpoint "solely determines the pay rates paid to its Personnel," though BFI must agree to any pay rates exceeding the rate it pays to one employee performing similar work (a rate negotiated by the Union); BFI establishes only the percentage mark-up that it will pay as a customer, which cannot make it a joint employer under current Board law.[6] (Jt. Ex. 1, at Ex. A.); *see Hychem Constructors, Inc.*, 169 NLRB 274, 275-76 (1968) (user company may "police reimbursable expenses under its cost-plus contract," including approving raises and overtime, without becoming a joint employer).

E. The Union's Claim That BFI Trains The Leadpoint Workers Mischaracterizes And Ignores The Evidence.

The record provides no support for the Union's assertion that BFI continually trains the Leadpoint workers. BFI trained Leadpoint's supervisors – not Leadpoint employees – when the facility reopened in 2012. Beyond that, the Union points to a handful of incidents over several years when BFI supervisors met with Leadpoint employees and explained what types of materials to pull off the lines – hardly evidence showing constant or significant training of the Leadpoint employees, especially given Leadpoint's exclusive role in conducting new employee training – a fact the Union utterly ignores. (BFI Br. at 7, 19, 23, 33-36.) In *Laerco Transportation*, the user

[5] The Union presented no evidence on these issues regarding the Housekeepers or Screen Cleaners.

[6] There is no evidentiary basis for the Union's assertion that, simply because BFI supervises the one sorter it employs, it should be inferred that BFI also supervises the Leadpoint Sorters.

company's supervisors regularly gave new-hire training directly to the provider's employees without becoming a joint employer. 269 NLRB at 325. BFI's single training of Leadpoint supervisors and handful of interactions with Leadpoint employees, which merely ensure that it receives the services for which it pays, cannot establish a joint employer relationship.

Nor does the Union present any evidence that BFI trains the Screen Cleaners or Housekeepers. (BFI Br. at 19, 23, 33-36.) The testimony of Screen Cleaner Stevens, that BFI supervisors and employees trained him while he filled in as a "maintenance helper" for three to four days, does not show meaningful control. In fact, that testimony is irrelevant, given the Union did not include "maintenance helper" as part of the petitioned-for unit. (Bd. Ex. 1(a).)

F. The Union's Claim That BFI Constantly Controls And Monitors The Sorters Mischaracterizes And Ignores The Evidence.

Contrary to the Union's characterizations, BFI's supervisors do not spend a "significant" amount of their time "personally and directly observing" the Leadpoint employees, nor do they use walkie-talkies to do so indirectly. (BFI Br. at 20-24.) Indeed, the Union's own witnesses could provide only a few examples where BFI supervisors even spoke with them directly. While BFI does give tasks to the Leadpoint supervisors each day, it is Leadpoint that assigns those tasks and supervises its employees. BFI's directions to Leadpoint supervisors do not render it a joint employer relationship under current law. *See, e.g.*, *S. Cal. Gas Co.*, 302 NLRB at 461-62 ("constant" assignments by user to provider's supervisors insufficient).

Although the Union claims that BFI controls "how" Sorters perform their duties, that is not the case: BFI addresses its concerns to Leadpoint supervisors and has met with Leadpoint workers just a few times to discuss quality issues/what to pull off the lines. (BFI Br. at 34-36.) Sorting of different materials is the very service provided by the Sorters – and explaining what they should sort is not direction in terms of "how" to perform those services. *See Airborne Express*, 338

NLRB 597, 597, 612 (2002) (prompting drivers to get out on the road early to meet their contractual requirements with customers insufficient); *S. Cal. Gas Co.*, 302 NLRB at 461-62 (providing direction as to specific tasks to perform and how often, giving daily duties and raising compliance issues with the provider employer insufficient as a customer must necessarily exercise "sufficient control" to "see that it is obtaining the services it contracted for"). In comparison, the Union utterly fails to recognize that it is Leadpoint's large supervisory staff – three times the size of BFI's management team – that directs the Sorters how to provide those services on a daily basis, assesses their performance and trains them on a broad array of safety issues. (LP Ex. 1.)

Finally, the Union's contention that the ARD incorrectly found BFI does not control the speed at which the Sorters work and their productivity ignores the record: the undisputed testimony supports the ARD's decision that BFI controls only the speed of the lines and the facility's productivity; Leadpoint alone sets the Sorters' picking speed and productivity standards and monitors their performance against those standards. (BFI Br. at 23, 39-40; LP Ex. 2.)

G. The Union's Claim That BFI Controls The Housekeepers And Screen Cleaners Ignores And Mischaracterizes The Evidence.

The only evidence regarding the Screen Cleaners establishes that Leadpoint decides when to move a worker into a Screen Cleaner position and train them. (Tr. 244, 252, 292.) As to the Housekeepers, the only evidence was that one agreed with a BFI supervisor's request to clean under the fence lines; more importantly, that same Housekeeper "routinely refused" BFI's weekly requests to clean under trucks without being disciplined, demonstrating that even the Leadpoint workers do not view BFI as their employer. (BFI Br. at 26; DDE at 17-18 n.11.)

H. The Union's Claim That BFI Sets Work Rules For Leadpoint Workers Ignores And Mischaracterizes The Evidence.

The Union points to two "work rules" that BFI allegedly instituted regarding the Sorters: 1) limiting how often they could use the emergency stop button; and 2) requiring them to clean their

work areas.[7] However, BFI has established there is no emergency stop "work rule" affecting terms and conditions of employment (Union witness Harlin testified that he refused to follow a BFI supervisor's direction, without discipline). (BFI Br. at 13-14, 20.) BFI's direction to the Sorters to clean their work areas did not affect terms of employment. (BFI Br. at 20, 25, 35-36.) Rather, it is reasonable for a customer to expect a contractor to keep the jobsite clean and asking its workers to clean their work area cannot create a joint employer; otherwise, when a homeowner asks a contractor's employee to clean up his mess before leaving, she becomes his employer.

I. The Union's Claim That BFI Has Dismissed Leadpoint Workers Ignores And Mischaracterizes The Evidence.

Although the Union claims that BFI has "exercised" its right to dismiss Leadpoint workers on three occasions, BFI disproved those claims: Leadpoint independently investigated and made its own disciplinary decisions in each situation (retaining and reassigning one of its employees).[8] (BFI Br. at 16-19); *see G. Wes Ltd. Co.*, 309 NLRB 225, 225-26 (1992) (user complaint to provider about intoxicated worker did not establish employer relationship because provider employer independently investigated and made its own disciplinary decision); *S. Cal. Gas Co.*, 302 NLRB at 462 (complaining a worker was asleep on the job and asking the provider that he not be returned to the worksite held "merely to be the exercise of a right of an owner or occupant to protect his premises" and did not establish joint employer relationship because the provider independently chose to discharge the worker "rather than transfer him to another job location").

J. The Union Relies On Irrelevant Evidence.

The Union also relies on evidence that it acknowledges is irrelevant under current Board law, such as BFI's physical control of the locations where Leadpoint must assign employees and

[7] The Union makes no similar argument regarding the Screen Cleaners or Housekeepers.

[8] That one Leadpoint worker was assigned to another contract refutes the Union's claim that Leadpoint employees are hired only for the Recyclery contract and are "laid off or fired" when BFI no longer needs them, for which there is no evidence.

ensuring the Leadpoint workers comply with its safety policies.[9] *See, e.g., G. Wes Ltd. Co.*, 309 NLRB at 226 (no joint employment when user instructed workers where to work and with whom); *Hychem Constructors, Inc.*, 169 NLRB at 276 (no joint employment when user acts to protect its premises); *Airborne Express*, 338 NLRB 597, 612 (2002) (threatening to bar a worker after he walked on a moving conveyer, "which may result in injury and impose legal liability" for the user company, did not amount to discipline).

Furthermore, although the Union claims that BFI controls maintenance of the equipment and Leadpoint could not provide information on safety standards or manufacturing specifications, it cites to no supporting evidence. At any rate, the fact that BFI owns the Recyclery and equipment is irrelevant under current Board law. Provider employees typically work at a facility and/or on equipment owned by the customer without becoming the customer's employees. For example, the drivers in *Laerco Transportation* and *TLI* drove the user company's trucks, while the unit employees in *Southern California Gas Co.* and *Island Creek Coal Co.* performed their work at the user customer's sites, yet the Board never considered such ownership to be a relevant factor.

Similarly, the Union claims the ARD failed to consider that the Agreement limits the Leadpoint workers' "free speech" by requiring them to protect BFI's confidential information and not injure BFI's business, interests or reputation. The Union never presented any such evidence or argument to the ARD. At any rate, such restrictions are common in business relationships and do not establish that BFI meaningfully affects terms and conditions of employment.

II. The Union Misapplies Current Board Law To The Record Evidence.

A. The Union Misstates The Current Board Standards.

Contrary to the Union's claim, the Board's decision in *TLI* did not go beyond *Browning-Ferris Industries* and adopt a "new" requirement of "meaningfully" affecting terms and

[9] The Union makes no similar argument in regards to the Screen Cleaners or Housekeepers.

conditions of employment. (Union Br. at 22.) Rather, the *Browning-Ferris* standard itself requires significant control over the unit employees' essential terms and conditions of employment. *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3rd Cir. 1982). The Union similarly errs in claiming the Board's current standard under *TLI* and *Laerco Transportation* does not require direct or immediate control over essential terms and conditions of employment (Union Br. at 23); indeed, former member Liebman acknowledged "that the joint employer's control over these matters be direct and immediate" under *TLI* and *Laerco Transportation. Airborne Express*, 338 NLRB at 597 (Member Liebman, concurring).

B. The ARD Appropriately Applied The Applicable Board Law.

While the Union recognizes the joint employer analysis is fact-intensive (Union Br. at 29), it challenges the cases upon which the ARD relied, ignoring the fact that the totality of the circumstances in this case are analogous to those cases. For example, while the drivers in *TLI* received routine instructions on where to take their deliveries – similar to the routine instructions BFI gave the Sorters on what to take off the sorting lines or where to clean – the drivers were also required to report their accidents to the user company – just like the Agreement requires here. 271 NLRB 798, 798-99 (1984). In response, the user company reported accidents and other employee issues to the provider company, which independently investigated and made its own disciplinary decisions – just as the record shows Leadpoint did when BFI reported the alcohol and property damage incidents. *Id.* at 799. Importantly, the user company did not hire, fire or discipline the unit employees – just as the ARD properly found in this case that it was Leadpoint, not BFI, that hires, fires and disciplines its employees. *Id.*; *accord G. Wes Ltd. Co.*, 309 NLRB at 225-26 (giving routine instructions and complaining about intoxicated worker insufficient when user company did not discipline the worker and had no role in "hiring, firing, processing of grievances, administration and negotiation of contracts, [or] granting of vacations or leaves of absences").

Similarly in *Laerco Transportation*, the user company gave routine instructions on where to deliver merchandise, occasionally directed the provider's drivers where to unload particular loads, and required the drivers to comply with its safety regulations; and the user employer's agreement with the provider allowed it to establish driver qualifications and reject assigned drivers – just as the Agreement does here. 269 NLRB at 324. Additionally, the user company occasionally pointed out performance problems to the provider employer – just as BFI has done; however, the provider employer independently investigated and resolved performance issues – just as the record established occurred regarding the alcohol and property damage incidents. *Id.* at 325. Furthermore, unlike the large Leadpoint supervisory staff at BFI's Recyclery, the provider employer had no supervisors on site and the user employer provided all necessary supervision. *Id.* Additionally, the user employer attempted to resolve minor issues for the provider's employees – a fact not present here. *Id.* at 326. Indeed, when Sorter Harlin disagreed with BFI supervisor Sutter regarding the emergency stop button, they presented their disagreement to Leadpoint and Harlin ultimately ignored Sutter without any resulting discipline.

The ARD also relied on *Island Creek Coal Co.*, in which the user company went beyond telling unit employees where to work, by directing some about "what work to perform, assigning them particular pieces of equipment, restricting their access to particular pieces of LCCC equipment, and inspecting and requiring work to either be redone or changed in some fashion," going far beyond the few isolated instructions in this case. 279 NLRB 858, 864 (1986). However, just like BFI, the user company had no involvement in "the normal functions of an employer," i.e., "the hiring and firing, processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leave of absence." *Id.*; *accord Teamsters Local 776*, 313

NLRB at 1162-64 (user not joint employer where it designated how many and what type of drivers it needed and gave instructions regarding routes and permits, but did not hire, fire or discipline).

In *Southern California Gas Co.*, the user company often communicated with the provider company's supervisors to ensure it received bargained-for custodial services, including providing a chart showing the specific tasks the night shift had to perform and how often. 302 NLRB at 461. The user company also contracted for a certain number of day shift employees – similar to BFI's target headcounts – and had ongoing communications with their supervisors regarding daily tasks based on constant orders and requests. *Id.* at 461-62. The user company's supervisors checked "to insure compliance" through the provider company's supervisor – just as BFI typically does in dealing with Leadpoint's supervisors. *Id.* at 462. Just as with Leadpoint, "the significant functions of hiring and firing, the processing of grievances, negotiating contracts, [and] the granting of vacations or leaves of absences were retained by" the provider company. *Id.* Furthermore, while the user complained about a worker sleeping on the job and did not want him to return – just as Keck informed Leadpoint of the alcohol and property damage incidents – that did not show the user company discharged the worker. *Id.* Rather, the provider company independently made that decision rather than transfer him to another location – just as Leadpoint did (including retaining but reassigning one of them). *Id.*

C. The Union Relies On Inapplicable Board Law.

As previously explained by BFI, the Union has mischaracterized a handful of interactions between its supervisors and Leadpoint workers over several years, BFI's directions to Leadpoint supervisors and BFI supervisors' limited use of walkie-talkies – to notify Leadpoint supervisors how long the lines will run – as "constant[] control," a "detailed awareness and control" of, or "oversee[ing] and monitor[ing]" the Leadpoint workers' work "every minute of every shift." (BFI Br. at 12-14, 20-30.) Moreover, the cases on which the Union relies are not similar to the facts of

this case. To the contrary, the Union largely relies on irrelevant Board law that does not establish BFI as a joint employer of the Leadpoint workers under the totality of the circumstances.[10]

For example, while the Union claims that *Quantum Resources Corp.* found a joint employer relationship based on frequent routine supervision, the user company in that case also required the unit employees to participate in quality improvement programs and awarded them prizes, wrote their original job descriptions, had to approve any job responsibilities or title changes, approved all hiring decisions and overtime, had involvement in promotion and discharge decisions, "pushed through" a raise, reimbursed all insurance benefits and included the unit employees in its self-insurance workers' compensation coverage – all factors demonstrating direct control that do not exist here. 305 NLRB 759, 759-60 (1991).

Holyoke Visiting Nurses Association also did not involve mere supervision of a routine nature; rather, the provider's RNs brought workplace problems to the user company, which solely supervised the RNs and decided which RNs were assigned to and removed from its facility. 310 NLRB 684, 685-86 (1993). Similarly, in *Computer Associates International, Inc.*, the Board placed "particular reliance" on the user company's "substantial role in the selection of applicants for hire." 332 NLRB 1166,1166 n.2 (2000). There is no similar evidence here.

In *G. Heileman Brewing Co.*, the user company not only provided the sole supervision on site, it also worked with the union steward to determine which employees would work weekend overtime, initiated and decided the appropriate level of discipline, bargained with the union

[10] The Union also relies heavily on outdated Board and circuit court cases that do not apply the current "direct control" analysis and that, further, are factually inapplicable. *See, e.g., Sun-Maid Growers of Cal.*, 239 NLRB 346, 350-51 (1978) (user company decided which assignments took precedence, selected workers for additional shifts and called them at home, instructed unit employees on a regular basis without contacting their offsite supervisors, requested certain employees be hired and assigned to its facility, and issued them employee identification cards); *Hamburg Indus., Inc.*, 193 NLRB 67, 68 (1971) (focusing on the user company's "indirect" control over terms and conditions of employment and routine work instructions); *Gallenkump Stores Co. v. NLRB*, 402 F.2d 525, 528-29 (9th Cir. 1968) (franchiser with authority to issue uniform rules and regulations, set hours of operations and determine store layout); *Manpower, Inc.*, 164 NLRB 287, 287-88 (1967) (user company requested certain drivers be assigned, tested drivers' skills, received their complaints, disciplined them, provided all daily supervision and held itself out as their employer).

regarding informal grievances and schedules, and granted company benefits – none of those factors exist here. 290 NLRB 991, 999-1000 (1988).

In *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v.* NLRB, the user company administered road tests to the provider's drivers and refused to allow the hiring of applicants he did not approve of, selected which employees would work which routes, handled the drivers' complaints, weighed in on discipline and developed an incentive award program – factors not present here. 363 F.3d 437, 440-41 (D.C. Cir. 2004); *see also Pac. Mut. Door Co.*, 278 NLRB 854, 857-58 (1986) (user company controlled the drivers, including how they operated and maintained the vehicles and what accident procedures they had to follow, provided property handling and special precaution training, and assumed responsibility for the drivers as "any regular employee"); *D&F Indus., Inc.*, 339 NLRB 618, 640 (2003) (user company established pay rates, suspended unit employees and selected specific employees for layoff). In comparison, Leadpoint alone trains its employees, applies personnel policies, establishes pay rates, administers discipline and assumes workers' compensation for its employees. (BFI Br. at 14-40; Jt. Ex. 1; LP Ex. 2.)

Despite its criticism of the ARD's DDE, the cases he relied upon are far more similar to the facts established in the record here than the cases the Union relies on in its Brief. Regardless of the Union's wish that current Board law was different, the ARD correctly applied it to the facts of this case. Whether the Board decides to change the current law is another matter.

III. The Union's And GC's Proposed Joint-Employer Test Fails To Satisfy Due Process Requirements And Is Contrary To The Language, Legislative Intent And Fundamental Policies Of The Act.

A. The Union's Proposed Joint-Employer "Standard" Is A Misnomer Because It Provides No Meaningful Standard At All.

As the Supreme Court has opined, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or

required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012) (holding due process required fair notice even when regulations imposed no criminal penalty or monetary liability). Inherent in the notion of due process is the requirement that the obligation be clear enough that citizens can reasonably ascertain to whom it applies.

The "standard" the Union and GC propose, however, is no standard at all; rather, it is merely a post-hoc conclusion drawn only after a results-oriented inquiry. According to the Union:

> An employer [should be] considered to jointly employ a unit of employees when it *possesses sufficient authority over* the employees or *their employer* such that its participation is a request [sic; presumably the Union meant "requisite"] to meaningful collective bargaining. Such authority can be either direct or *indirect*."

(Union Br. at 47 (emphases added).) The GC proposes essentially the same standard. (GC Br. at 16-17.) That "standard" provides no guidance for businesses about how they can structure their operations to provide certainty that they are, or are not, joint employers. Nor does it explain what "meaningful bargaining" is. Absent such guidance, adopting the Union's and GC's proposed test would fail to provide the notice required by due process.

The Union's proposed test contrasts sharply with the Board's three-decade old standard for determining joint-employer status. Under *TLI* and *Laerco Transportation*, one company can structure its operations utilizing third parties without the risk of being held responsible for the third parties' actions or having to jointly bargain with those parties' employees, provided it does not exercise direct control over the third parties' employees. *TLI, Inc.*, 271 NLRB at 798; *Laerco Transp.*, 269 NLRB at 325. That standard provides a bright line that everyone – employers, employees, unions, the Board and the courts – can apply. The Union's and the GC's proposed test, however, provides no line at all, other than what a regional director or administrative law judge might draw well after the parties have established the parameters of their relationship.

Indeed, the Union's and GC's proposed standard is incapable of clear definition because business relationships typically involve an agreement that necessarily but indirectly impacts the terms and conditions of employment for the other's employees. Service contracts, in particular, often involve significant control by the customer over the service provider and, when services are performed on the customer's property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider's employees' terms and conditions of employment. Hours the services are performed, the skills of the individuals who will perform them and conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected – not to mention the amount the customer is willing to pay for the services – all necessarily impact the service provider's employees' terms and conditions of employment. Under the Union's and GC's proposed test, the customers in such cases would be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services and terms that prohibit the services from being performed before or after certain hours or on weekends and require the contractor's employees to leave her home clean and free of hazards at the end of every day.

The Union might argue that its test is limited because it will apply only to those businesses necessary for "meaningful bargaining." Yet that criterion is merely a post-hoc assessment without standards, as it fails to provide any guidance as to what constitutes "meaningful bargaining." Consider, for example, the facts of this case. Leadpoint hires, fires, disciplines, pays and supervises its employees. Despite its claims to the contrary – which are unsupported by record evidence as detailed above – the Union could negotiate most all of the petitioned-for employees'

terms of employment without any involvement by BFI. Yet, the Union contends that BFI is necessary for meaningful bargaining regarding the Leadpoint employees.

Southern California Gas, however, demonstrates that "meaningful bargaining" can occur without the user/putative joint employer. In that case, the supplier provided janitorial services and had a long history of negotiating with the union over wages, hours, fringe benefits and other working conditions of its employees. 302 NLRB at 461. The user company had never been in those negotiations and, as the Board noted, "[t]here was no evidence that [the user company's] lack of participation in the bargaining effected the bargaining process." *Id.* To the contrary, the union resolved employee grievances with the supplier company, who sought the union's acquiescence in any changes that affected the employees. *Id.*; *see also Laerco Transp.*, 269 NLRB at 326 (relying particularly on the fact that the supplier company and the union "have had broad collective-bargaining agreements which effectively control many of the terms and conditions of employment of the petitioned-for employees" in concluding there was no joint employer relationship). These cases demonstrate that, despite the Union's protestations, a user employer such as BFI is not a necessary party for "meaningful bargaining."

No doubt, like any business, Leadpoint would be reluctant to negotiate employment terms for its workers that would cause it to lose money on its operations at the Recyclery, such as a higher wage rate than BFI would agree to pay under its cost-plus contract. But an employer like Leadpoint might be willing to pay a higher wage than its customer will reimburse if that loss is offset at another of its operations. Moreover, if the financial limitations a customer imposes on an employer are sufficient to demonstrate that "meaningful bargaining" regarding the employer's

workers cannot occur without the customer, then there truly is no limit on what entities can be found to be joint employers.[11]

Perhaps regional directors and administrative law judges might try to limit the Union's and GC's proposed test by requiring that the service provider's employees render services that are integral to the nature of the putative joint employer's business. Janitorial services, however, are certainly not integral to most business operations, yet it is clear the Union's proposed standard would bring them within its reach and find property owners that utilize a janitorial service to be the joint employer of the providers' employees. (*See* Nat'l Employ. Law Project Br. at 15-16.) Clearly, functional integration is not a necessary factor in the Union's proposed test, and no others are readily apparent. In the absence of any reasonable ability to ascertain, in advance, who is a joint employer, the Union's and GC's proposed "standard" fails to provide the notice that due process requires.

B. The Union's And GC's Proposed "Standard" Would Violate The Clear Provisions And Dictates Of The Act.

The Supreme Court has made it abundantly clear that an employment relationship does not exist unless the worker is directly supervised by the putative employer. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 167-68 (1971). In *Allied Chemical*, the Court rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that:

> "It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . *"Employees" work for wages or salaries under direct supervision.* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it

[11] While notice and comment rulemaking might have provided some standards that could define "meaningful collective bargaining," none have been proposed by the GC, the Union or its amici for BFI to address.

> intends now, that the Board give to words not far-fetched meanings, but ordinary meanings."

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). More recently, in *NLRB v. Town & Country Electric,* the Court again turned to the dictionary definition of the term, defining employee as a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." 516 U.S. 85, 90 (1995) (quoting Black's Law Dictionary 525 (6th ed. 1990)).

Just as the Board cannot define the term "employee" in a manner inconsistent with its ordinary meaning, it cannot adopt a "far-fetched" definition of "employer" that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship; namely, direct control of the employee.[12] *Cf. NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (6th Cir. 1995) ("The deference owed the Board . . . will not extend, however, to the point where the boundaries of the Act are plainly breached."). Indeed, if Congress meant "employee" to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant "employer" to be the person who directly controls the employee. And the Board is not free to simply ignore what Congress meant by rewriting the Act through adjudication.

Apart from the problem that the Union's and GC's proposed joint-employer standard is inconsistent with the Act's language and the ordinary meaning of the terms "employee" and "employer," it also is contrary to the mandate Congress gave the Board when it adopted the

[12] Similarly, Congress limited the Board's ability to certify a unit of employees employed by more than one company by requiring that all employees in a unit be employed by a single employer. *Oakwood Care Ctr.*, 343 NLRB 659 (2004). Obviously, had Congress intended to allow for the certification of a unit of workers with different employers, it would simply adding two words, "or employers," to Section 9(b). The Board has overcome this limitation by the fictional "joint employer" entity. That fiction, as it has been applied historically, may be consistent with Congressional intent. But the fiction that two wholly separate companies constitute a "joint employer" entity cannot be legitimately extended as far as the Union and GC propose simply because one has control over the other to an extent that it "implicate[s] terms and conditions" of the other's employees. (Union Br. at 48.) Such a definition is inconsistent with any reasonable interpretation of what Congress meant by using the singular term, "the employer," in the Act.

Taft-Hartley Act in 1947. In particular, Congress intended Taft-Hartley, in part, as a directive to the Board that it apply common law agency principles when interpreting the Act's provisions. *See, e.g.*, 61 Stat. 137-38 (1947), 29 U.S.C. § 152(3) (rejecting Supreme Court's decision in *NLRB v. Hearst Publications*, 322 US 111 (1944), to the extent that decision allowed the Board to ignore common law agency principles in distinguishing employees from independent contractors). Remarkably, rather than acknowledge that, by adopting the Taft-Hartley Act, Congress "repudiated" *Hearst, Allied Chem.*, 404 U.S. at 168, the GC actually cites to *Hearst* in arguing that the Act's "definition of employer 'must be understood with reference to the purpose of the Act and the facts involved in the economic relationship[.]'" (GC Br. at 9-10.)

Indeed, the Union and GC completely ignore the effect of Taft-Hartley, focusing instead on the Act's original language in asserting that their proposed joint-employer test would further the Act's fundamental purposes. Yet, the significance of the dramatic changes Congress made to the Act in 1947 – in the face of massive opposition by organized labor and over the veto of the President – cannot be overlooked, particularly with respect to defining what constitutes an employment relationship. It is the Act *as it exists today* that the Board must apply, and, in its current form, Congress has unequivocally directed the Board to apply common law agency principles in defining the employer-employee relationship. The Union's and GC's proposed joint-employer standard would ignore those principles, basing the determination of an employer relationship on the control that one company has over another merely because that control "implicate[s] terms and conditions" of the other's employees. Simply because one company has a contractual relationship with another sufficient to "implicate" the terms and conditions of employment of the other company's workers does not demonstrate that either company has been authorized to act as the agent of the other. Yet, the Union and GC would find both companies to be

a joint employer, equally liable for the unfair labor practices of the other and equally obligated to bargain with the employees who are purportedly jointly employed. That result is contrary to the directive Congress mandated when it adopted the Taft-Hartley Act and cannot be countenanced.

C. The Union's And GC's Proposed Joint-Employer Test, In Practice, Would Undermine The Act's Purpose Of Encouraging Effective Bargaining.

When Congress adopted the Act, it made clear its primary purpose was to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. As noted above, however, a series of cases that had expanded the Act's reach beyond what Congress intended caused Congress to revisit and substantially revise the Act in ways that directly or practically limited the process of collective bargaining. For example, Congress amended the Act to protect employee rights to *not* engage in collective bargaining or otherwise support unions and it made clear that the Act's reach was not as extensive as the Board and Court seemed to believe. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (amending 29 U.S.C. § 157). Another limiting change Congress made through the Taft-Hartley Act to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can *meaningfully* address the workplace concerns of a group of an employer's employees that shares a community of interest.

Although the Board and GC argue that their proposed test is calculated to advance meaningful collective bargaining by having all relevant "employers" at the table, they fail to recognize the obstacles created by forcing two different businesses to bargain over the terms of a group of employees only one of them directly controls. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant

concessions, might be irrelevant to, or contrary to the interests of, the other. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result.

The problems for effective bargaining caused by forcing two different business entities into a bargaining relationship are clear because:

> [T]he interests of [the] employers will [] necessarily conflict. Unlike joint employers that have explicitly or tacitly agreed to a common undertaking, here the employers are buyer and seller, roles that are complementary in some respects and clearly conflicting in others. Each derives some benefit from the other. However, only the user employer derives the ultimate profit from the work of the employees; the supplier is merely one of many resources utilized in the user's enterprise. The structure of the relationship between these employers is voluntary and contractual . . . . Requiring that the employers also engage in involuntary multiemployer bargaining injects into their relationship duties and limitations beyond those established and allocated in their agreement, creating severe conflicts in the underlying business relationship and rendering impossible the productive collective bargaining the majority envisions.

M.B. Sturgis, 331 NLRB 1298, 1320-21 (2000) (Member Brame, dissenting) (citations omitted). Although *Sturgis* involved true multi-employer unit considerations, the Union's and GC's proposed joint-employer test would result in nothing more than deeming a multi-employer unit a joint-employer unit by adjudicatory fiat. And, regardless of whether the Board decides to call two different business entities a "joint employer" even though one does not exercise direct control over the other's employees, the practical problems that will arise in collective bargaining are no less real than those that exist in what the Board currently recognizes as a multi-employer unit.[13]

[13] While the legislative history and Supreme Court decisions make clear that the Board cannot adopt such a far-fetched definition of "employer," dramatic changes to a well-settled statutory term should, at a minimum, comply with the requirements of the Administrative Procedures Act (APA). The APA's notice and comment rulemaking

IV. The Union And Its Amici Have Failed To Demonstrate That The Union's Proposed Standard Is Consistent With The Act Or The Definition Of "Employer" Under Any Other Federal Law.

Various Union amici have urged the Board to adopt a joint-employer standard comparable to that provided by federal labor and employment laws other than the Act. The Equal Employment Opportunity Commission (EEOC), for example, argues that the Board should adopt the EEOC's approach, pointing out that "staffing firms and their clients generally qualify together as joint employers" under the laws the EEOC enforces. (EEOC Br. at 8-9.) The assertion is certainly accurate under most federal anti-discrimination statutes – and, for the very reasons identified by the EEOC, it is generally true under the Act – because a joint employer finding is appropriate in such cases because "the client usually exercises significant supervisory control over the worker." (*Id.* at 9.) Concededly, if a customer exercises "significant supervisory control" over a supplier's employees, the customer will be a joint employer under current Board law. Nothing in the EEOC's brief, however, explains how the record here establishes "significant supervisory control." To the contrary, courts refuse to find joint employer status for purposes of liability under federal employment laws when the user company does not exert significant direct control over the worker. *See, e.g.*, *Jenkins v. Jewell*, 2014 WL 683706, at *4 (D. Idaho Feb. 20, 2014) (customer not a joint employer under Title VII, even though it retained the right to refuse workers assigned under the contract, when provider company retained "primary control" over worker).

Similarly, one of the Union's amici asserts that BFI already is an employer of Leadpoint's workers under some federal laws, particularly the Family Medical Leave Act (FMLA).

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procedures would at least allow for measured fact-finding and analysis, such as evaluating how successful "joint employer" negotiations have been, how long those successful negotiations took on average, how long the jointly-employed workers enjoyed the benefits of a collectively-bargained agreement before one of the joint employers terminated the relationship, how often the employees were then left with union representation but no collective bargaining agreement, or how often the successor employer, if any, adopted the collective bargaining agreement.

(Professors Br. at 8.) This assertion is not based on the statute's terms or any court decision, but on a superficial interpretation of a Department of Labor regulation that states:

> A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will *ordinarily* be found to exist when a temporary placement agency supplies employees to a second employer.

29 C.F.R. § 825.106(b)(1) (emphasis added).[14] Certainly in those *ordinary* cases a user employer will qualify as a joint employer under the FMLA, just as it would under the laws enforced by the EEOC (or under the Act), because the user exercises "significant supervisory control" over the temporary provider's employees. Nothing in this regulation, however, demonstrates that BFI is a joint employer of Leadpoint's employees under the FMLA because, very much *unlike* the ordinary case, Leadpoint supervises those employees directly. To that end, Leadpoint alone would have the obligation to reinstate Leadpoint employees returning from FMLA leave because it controls whom it hires and assigns to its positions at BFI.

Apart from failing to demonstrate that the Board's standard is different from their cited laws, these amici's arguments fail to appreciate two crucial differences between the Act and those other laws. First, Congress has provided clear directions to the Board and the courts regarding how the employment relationship needed to be defined. Although each statute has its own legislative history, the Board cannot ignore the unique history of the statute it oversees – including the Taft-Hartley amendments that were driven, in part, by the Board's early attempt to expand the

[14] The other assertions in the Professors Brief are based on equally pedestrian (or patently incorrect) interpretations of federal and state law. For example, the fact that a state understandably might require a user employer to ensure that its provider complies with state minimum wage laws is simply to further the state's interest in having its labor laws enforced. Indeed, requiring a primary contractor to agree its subcontractors will comply with a broad array of employment laws is a standard term in *any* contract with a governmental entity. No rational argument (and certainly no precedent) exists that such statutory or contractual terms operate to make the primary contractor the employer of its subcontractor's workers. Other of the Professors' assertions, such as the contention that questions regarding the firing of individual workers "are of questionable relevance" because they "are not mandatory subjects of bargaining," are patently wrong. *See, e.g., In re N.K. Parker Transp., Inc.*, 332 NLRB 547, 551 (2000) ("Termination of employment constitutes . . . a mandatory subject [of bargaining].").

definition of the employment relationship beyond the ordinary one that existed when the Act was adopted in 1935 and amended in 1947.

Second, the other laws to which amici point – from Title VII of the Civil Rights Act of 1964 to state workers' compensation laws – are all designed to provide and protect *individual* employee rights. The Act, on the other hand, provides and protects employees' rights to act *collectively*. To the extent the Board has discretion to interpret the term "employer" under the Act, appreciating this distinction is of fundamental importance. For example, it furthers Title VII's purpose to deem a prime contractor the joint employer of a sub-contractor's employee when the prime contractor affects that worker's individual rights, such as terminating access to the property because of gender. However, to then treat the prime contractor as the joint employer of all the subcontractor's employees for bargaining purposes as a result of that individual incident would be inimical to the Act if it has no control over the *collective* terms and conditions of the subcontractor's employees. Drawing upon the practice of other agencies is not rational where, as here, there are fundamentally different policies animating particular words in the statutes that Congress has entrusted different agencies to interpret and enforce. *Cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 278 (2009) (Souter, J., dissenting) (noting the United States Supreme Court has "stressed the contrast between two categories of rights in labor and employment law. There were 'statutory rights related to collective bargaining,' which 'are conferred on employees collectively to foster the processes of bargaining' . . . But 'Title VII ... stands on plainly different [categorical] ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities'") (quoting *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 51 (1974)).

Accordingly, the ARD made no clearly erroneous findings departing from Board law, nor are there any compelling reasons to dramatically change the Board's joint employer standard.

Dated this 10th day of July, 2014.

Respectfully submitted,

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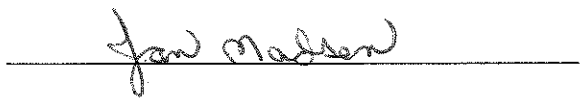

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